IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1770 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE MD SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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FIROZKHAN JAFFERKHAN PATHAN - Appellant(s)

Versus

STATE OF GUJARAT - Opponent(s)

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Appearance :

MR AD SHAH for Appellant(s) : 1,
MR RC KODEKAR, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA
and
HONOURABLE MR.JUSTICE MD SHAH

Date : 03/02/2006

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. This appeal has been filed by the appellant, the undertrial prisoner Firozkhan Jafferkhan

Pathan, against the order dated 13-9-2004 passed by the learned Special Judge (POTA), Ahmedabad, in Criminal Misc. Application No.2529 of 2004 in POTA Case No.1 of 2003 rejecting the application filed by the appellant for temporary bail.

2. The appellant was arrested on 27-2-2002 in connection with Godhra Railway Police Station I.C.R.No.9 of 2002 for the offences punishable under Secs.302, 307, 147, 148, 149, 438, 120-B and 153-A of the IP Code, Secs.141, 150 and 151 of the Indian Railways Act, Secs.3 and 4 of the Prevention of Damages to Public Properties Act, Sec.135(1) of Bombay Police Act as well as under Secs.3(2) and 3(3) of the Prevention of Terrorism Act, 2002 (hereinafter referred to as “the Act” for short) for the alleged offence of burning of coach No.S/6 of the Sabarmati Express on 27-2-2002 at 7.45 a.m. near “A” Cabin at Godhra Railway Station

resulting in the death of 59 persons and causing serious injuries to 48 persons and also causing damage to the railway properties.

3. As detailed discussion of the version in the police papers has been by the learned Special Judge (POTA), the same is not reproduced again in this judgment. When the train reached the Godhra Railway Station at about 7.43 a.m. i.e. much later than its scheduled time of 2.55 a.m. and after the train started at 7.48 a.m., the chain was pulled around 7.50 a.m. The train started again at 7.55 a.m. but after some distance, the chain was pulled again simultaneously from four compartments at 7.58 a.m. and it stopped only about 332 meters away from the platform near “A” Cabin and the incident is alleged to have happened around 8.00 a.m. when a large number of people from a nearby area including from Signal Faliya had attacked and set on fire

the said S/6 compartment. The police papers state that petro cans which were stored in the nearby Aman Guest House in the previous evening were used for setting the compartment on fire. At the time when the train halted, members who wanted to attack the compartment from the mob, pelted stones, banged iron pipes, lathis etc. and by cutting open the vestibule, entered the S/6 compartment, poured inflammable substances like petrol in it and set it on fire. The persons forming an unlawful assembly tried to prevent the passengers from getting down from the burning coach. R.P.F. and other police people reached on the spot and tried to control the mob by firing a few shots. However, the incident appears to have occurred in a very well planned and swift manner, because, within few minutes of halting of the train, it was attacked by a huge mob, armed with lethal weapons and cans of inflammable materials

like petrol, kerosene and acid were soon brought and S/6 compartment was set ablaze wherein 59 persons were charred and 48 persons were seriously injured.

4. The FIR was lodged by the engine driver Rajendrarao Raghunantrao Jadav at about 9.35 a.m. on 27-2-2002. A report under Sec.173(2) of Criminal Procedure Code (“Code” for short) was submitted by police on 22-5-2002 qua 54 accused. Reports/Supplementary charge sheets under Sec.173(8) of the Code were sent qua seven accused on 20-9-2002; qua three accused on 19-12-2002, qua two accused each on 16-4-2003 and 4-5-2003, qua one accused on 19-5-2003, qua six accused on 3-10-2003, qua two accused on 11-7-2004 and qua three accused on 3-9-2004. Earlier on 2-3-2002, Dy. S.P., Western Railway, requested the Judicial Magistrate (First Class) to add offence under Sec.3(1)(a)(b) of the Prevention of Terrorism Ordinance 2001 (POTA, 2001). Thereafter on

25-3-2002, a communication was sent to learned Judicial Magistrate to keep in abeyance the said provisions of POTA, 2001 at that stage. Thereafter, a request was made by the Dy. S.P., Western Railway to add the offences under Section 3(2)(3) of the Prevention of Terrorism Act, 2002 vide communication dated 18-2-2003 addressed to the learned Addl. Sessions Judge.

5. In view of the provisions of Sec.56 of the Act, the provisions of the Act have an overriding effect over the provisions of any other enactment. Secs.49(6) and 49(7) of the Act impose additional restrictions on granting of bail. However, in view of the proviso to Sub-section (7), these restrictions will not apply after the expiry of one year from the date of detention of the accused for an offence under the Act. The appellant preferred regular bail application admittedly one year after the accused was

detained. The said application was rejected. He thereafter preferred an application for temporary bail for a period of 30 days for enjoying conjugal rights being Criminal Misc. Application No.2529 of 2004. On affording opportunity of hearing to the parties concerned and on going through the evidence on record, the learned Special Judge (POTA) vide order dated 13-9-2004 rejected the said application and hence, the present appeal has been filed.

6. We have heard learned counsel for the appellant, Mr.A.D.Shah and learned Additional Public Prosecutor, Mr.R.C.Kodekar, for the respondent-State.

7. Mr.Shah submitted that the appellant was arrested on 27-2-2002 and is in judicial custody since then as an undertrial prisoner. He submitted that there is no evidence against the appellant in the entire papers of charge sheet. He has been falsely implicated

based on the statement of one Chatrasinh Gambhirsinh. Except the statement of this witness, there is no other prima facie material worth the name to connect the appellant with the crime in question. He further submitted that though accused Nos.1 to 15 were allegedly arrested between 7.45 a.m. and 8.20 a.m. with respective weapons, their arrest panchnamas were made only at 9.30 p.m. on 27-2-2002. He was on duty on that day and was arrested in the evening. He further submitted that there is no charge of conspiracy against him.

8. Mr.Shah further submitted that due to the appellant's confinement in jail, he fails to have conjugal relations with his wife being a married person. According to him, if a married person is denied conjugal life, it would lead to emotional, social and psychological problems. He relied upon the 1997 Criminal Law Journal p. 1509 in the case

of Ram Murthy Vs. State of Karnataka. It was held by the Apex Court that denial of conjugal life during the entire period of incarceration creates emotional problems to undertrial prisoners.

9. He further submitted that every convict prisoner is conferred with the right to enjoy furlough once in two years during initial period and once in a year during the period of imprisonment. According to him, the guilty person is entitled to go out of prison by enjoying furlough leave. However, undertrial prisoners, who are not yet held guilty, have no such right and hence, they have to remain in custody for more than two years without their trial being completed and their guilt being proved. He further submitted it is the fundamental right of undertrial prisoners to have a speedy trial. According to him, there is no possibility of completing his trial in the near future.

10. He further submitted that the appellant aged about 27 years was a working as Welder/Fitter in Godhra Kothi Steel Ltd. having a family consisting of wife, daughter aged about 6 years, son aged about 3 years, aged mother and two brothers and has no criminal antecedence. He has roots in the society and hence, if he is released on temporary bail on humanitarian ground, no prejudice would be caused to the prosecution.

11. Learned Additional Public Prosecutor, Mr.R.C.Kodekar, showed us the relevant statements of witnesses as regards the nature of conspiracy. He submitted that there was sufficient prima facie material to show that a watch was being kept for the arrival of the train as a part of conspiracy. Taking us through the relevant papers, he submitted that 7-8 containers of petrol of 20 litres each were brought in the previous night and stored at the Aman Guest

House, which is very near to the place of the incident. To stop the train near “A” Cabin, i.e. the place convenient to attack from the nearby Signal Faliya and other localities, chain pulling was done in four compartments. The mob was instigated to carry on their attack by announcements from a nearby mosque. The movement of containers in which inflammable material was brought and the compartment was set on fire were seen by various witnesses. According to him, the gathering of such a huge mob and attacking with lethal weapons by setting the compartment on fire with inflammable substances within minutes of halting the train would clearly establish the formation of an unlawful assembly and hatching of conspiracy to achieve the common object. Because of the incident, riots broke out in the city and the injured had to be looked after and inquest panchnama was to be drawn.

Apart from that, several persons were taken in custody on the spot and in view of the magnitude of the incident, arrest panchnamas could not be drawn immediately but could be drawn later on in the evening and statements of the police personnel apprehending some of the accused on the spot were recorded on 1.3.2002. In view of the aforesaid, it cannot be said that the evidence appearing against the appellant is concocted. Lastly, he submitted that the presence of the present appellant with his active role has been prima facie established on the spot along with gupti. He further submitted that as the offence attracted the provisions of Section 120-B of IPC, it would be enough if the accused is present there. However, there is the statement of Chatrasinh Gambhirsinh regarding his involvement in the conspiracy part. Generally there will not be any direct evidence as regards hatching of

conspiracy is concerned. Here in this case, according to him, there are evidence on record to that effect also on the basis of documentary evidence and on the basis of statements recorded under Sec.164 of the Code or Sec.32 of the Act. As far as the prayer to release the appellant on temporary bail for enjoying conjugal right is concerned, he submitted that there is no provision in the legislature to grant temporary bail on the ground of conjugal right and, therefore, the appellant may not be released on temporary bail.

12. We have gone through the entire record pertaining to the case. We have also considered the submissions made by the learned counsel for the respective parties. We would not opine on the reliability of the evidence at this stage on any argumentative grounds. According to us, statements recorded of the witnesses under Section 164 of the

Code and under Section 32 of the Act as well as other record prima facie indicate that substantial quantity of inflammable substance like petrol had been accumulated at a nearby place prior in point of time and immediately the train was halted by pulling chain at about 8.00 a.m. on 27-2-2002, S/6 compartment was set on fire with the same. It is clear from the statements that two meetings had taken place in the Aman Guest House, Signal Faliya, Godhra in the night of 26-2-2002 from where specific instruction of Maulvi Hussain Umarji for setting S/6 compartment of the Sabarmati Express coming from Ayodhya on fire was communicated by Haji Bilal and Faruk Bhana. The owner of the guest house and his accomplice were given the work of collecting petrol in the night of 26-2-2002 itself and 140 litres of petrol were collected from a nearby petrol pump and kept in Aman Guest

House in the night of 26-2-2002 and as a part of conspiracy, the movement of train was verified from the Godhra Railway Station in the early hours of 27-2-2002. Soon after the first chain pulling was done at the platform immediately after the train started, the chain pulling was done simultaneously from various compartments. Thereafter, the petrol cans stored at Aman Guest House were taken in a goods rickshaw near the "A" cabin and the compartment was set on fire by putting burning rags inside the compartment and through broken windows by the miscreants. Some of the miscreants forcibly entered the compartment by cutting open the vestibule and poured the petrol there. None of the passengers were permitted to come out from the compartment by the miscreants by creating a terrorized atmosphere and also by beating them and pelting of stones. In order to instigate the mob, provocative slogans

were announced through the loudspeaker from a nearby mosque. As a consequence of the above referred incident, 59 persons were charred to death and 48 persons were seriously injured apart from causing damage to the railway properties.

13. From the aforesaid, it is prima facie established that there is sufficient material to indicate that conspiracy was hatched for attacking the compartment in which Kar Sevaks were travelling from Ayodhya and that inflammable material was collected on the previous night of 27-2-2002 in the Aman Guest House, which was very near to "A" cabin where the train was halted after simultaneous pulling of chain from four compartments and where a mob of 900 persons attacked the train and some of them set the S/6 compartment on fire by using petrol collected in the previous evening and the whole conspiracy was successfully completed.

All the aforesaid prima facie indicate that it was a well thought out plan for achieving the common object of committing the crime in question.

14. On an evaluation of the facts and circumstances narrated hereinabove, we are of the opinion that the role attributed to the appellant has been established prima facie from the evidence appearing on record. It is clear that the appellant was arrested on 27-2-2002 and was remanded to police custody. There is a recovery of gupti from the appellant. Moreover, there is a recovery panchnama to that effect also. Apart from the above, the presence of the appellant and his active role has been established from the statement of Chatrasinh Gambhirsinh.

15. It is required to be noted that the present appeal is for releasing the appellant on temporary bail for enjoying conjugal life. It is true that he is a young married man.

However, fact remains that there are provisions to the effect qua undertrial prisoners who have been detained without any trial and also qua convict prisoners. Considering various aspects in mind and also to enable the convict prisoners to come out from custody and mix with the society and also their family members, the legislature has carved out a law and provided vacation to them for some days. By the said law, the convict prisoners are entitled for furlough of 15 days once in two years for three times and thereafter 15 days for every year during the period of imprisonment. As far as undertrial prisoners are concerned, there is a provision to grant them regular bail or temporary bail depending upon the facts and circumstances. Hence, the present prayer has been made by the appellant on the basis of his right to enjoy conjugal life. However, no specific provision has been made by the

legislature for vacation qua undertrial prisoners. The court below has considered the above aspect on the basis of law laid down by the Apex Court in 1997 Cri.L.J. p.1508. Some relevant portion of the decision has been reproduced by the learned Special Judge in her judgment. An article written by eminent jurist has also been taken into consideration by the court below. We can say that it is a well reasoned order passed by the court below after considering all aspects of the matter including facts, law and social circumstances. We also share the same view which has been adopted by the court below keeping in mind the fact that the present appellant is one of the prima accused of the heinous crime involving burning of coach No.S/6 of the Sabarmati Express at Godhra resulting in the death of 59 persons and causing serious injuries to 48 persons apart from causing damage to the railway

properties. If he is released on temporary bail, he may not be available for trial. As far as the right which he has claimed is concerned, we have gone through the case law relied on by learned counsel for the appellant and dealt with by the court below and we are of the view that there is no provision to grant temporary bail on said ground. The function of the court to interpret the law and not to enact the law. Enact the law is the function of the legislature. When the legislature has enacted the law for providing vacation to the convict prisoners, case of the undertrial prisoners must have been kept in mind. However, no provision to that effect was made qua the undertrial prisoners keeping in mind various aspects of the matter. One of the prima aspects is that the prisoner is an accused of serious crime and the court after applying its mind and after going through the papers

of charge sheet rejected bail application keeping in mind the fact that till the trial accused is required to be kept in judicial custody in the interest of justice. If he is released then there will be all possibility of winning over the witnesses or trying to interfere with the course of justice and, therefore, legislature thought it fit and proper not to grant vacation to the undertrial prisoners.

16. Having regard to the facts and circumstances discussed above, we are of the opinion that the impugned order passed by the learned Special Judge (POTA) is just and proper and no illegality has been committed warranting interference by this Court in this appeal. This appeal is therefore required to be rejected.

17. This appeal is hereby rejected.

18. Since the observations by this Court in this judgment are made for the purpose of deciding

this appeal, the same may not prejudice the parties in any other application or in trial.

(R.P.DHOLAKIA,J.) (M.D.SHAH, J.)

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